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All for One, or One for All

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All for one or one for all

BY RICHARD H. PILDES 

FOR SEVERAL YEARS, THE VOTING RIGHTS ACT HAS BEEN THE LEAST NOTICED, BUT perhaps most effective, of all federal civil-rights statutes. Recently, however, the act has dramatically entered public consciousness, catalyzed by two principal events: President Clinton's nomination, later withdrawn, of Professor Lani Guinier to head the Justice Department's Civil Rights Division, and the Supreme Court's decision in *Shaw v. Reno*. *Shaw*, decided in June, cast doubt on the constitutionality of designing election districts in certain ways to enhance minority representation.

Shaw was a response to the way in which the North Carolina General Assembly had reapportioned the state after the 1990 Census. The state created a new congressional district, District 12, in which Black voters constituted a slight majority. District 12 is a tortuous, 160-mile long snakelike district winding through 10 counties, often in a corridor not much wider than the interstate highway.

In a 5-4 decision, the Court concluded that District 12 might have gone too far in the effort to ensure fair and effective minority political representation. The Court described the district as "tortured," "dramatically irregular," "bizarre," and "irrational on its face." The odd shape suggested the district had been drawn on purely racial grounds. For the district to be found constitutional, the state would have to rebut this inference. Thus, Shaw holds that minority-dominated election districts which are extremely irregular in shape are constitutional only if — as may be unlikely — they can satisfy the extremely demanding constitutional standards of strict scrutiny.

Shaw reveals the fundamental tension between requiring election districts to be based on geography and seeking to ensure that the interests of minorities are represented fairly and effectively. The Voting Rights Act requires that where racially-polarized voting exists, geographically concentrated minorities must be made the majority when an election district can be drawn to do so. When minorities are spread out over large areas, this becomes extremely difficult. Under current voting systems, the only options are to draw extremely contorted districts — the option *Shaw* now severely limits — or to leave minorities in the political control of a consistently hostile majority.

In the essay below, published in *The New Republic* before Professor Guinier's nomination, I suggest an alternative to these two options. This alternative, called cumulative voting, also was endorsed by Professor Guinier. Cumulative voting will be familiar to many readers from the corporate context, where it was once used extensively.

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In the wake of *Shaw*, the appeal of alternatives like cumulative voting may increase. In many contexts, cumulative voting might offer an effective way of overcoming the conflict between geography and territory that is beginning to stymie voting-rights policy. In North Carolina, for example, the state could be divided into three congressional districts, with each district electing four representatives to Congress. Each voter would have four votes to distribute among candidates in any way the voter wishes.

As the essay that follows indicates, cumulative voting has its own potential problems as well as advantages. Congressional elections might be the least auspicious place to begin experiments in cumulative voting, and Congress would have to revise federal election law to permit it. However, as voting-rights issues assume center stage in current civil rights debates, it may well be an option worth considering and testing.

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As the dozens of new legislative districts drawn after the 1990 census await court approval, the Voting Rights Act is once again under close scrutiny. In November and December of 1992, the Supreme Court heard major cases challenging the redistricting of Ohio and Minnesota. At least nine more redistricting challenges await the Court's attention. These battles will likely bring to a boil long-simmering ideological and political controversies over the Voting Rights Act.

The disputes center on the creation of "safe minority districts" in many predominantly white jurisdictions. Imagine, for example, a town whose population is largely white and is governed by a five-member board; the board members are elected at large. Even if Blacks constitute 20 percent of the town's voters, the white majority consistently can control all five seats if it votes as a bloc. In this circumstance, the Voting Rights Act responds by breaking the town into five distinct districts, one of which is drawn so that its boundaries encompass the city's mostly Black neighborhoods. The town will still be governed by a five-member council, but Black voters, whose votes would otherwise have been submerged, now have the effective power to choose at least one member. The act works roughly the same way for congressional districts.

Measured by the number of minorities who hold public office, the system works. In 1970, for example, fewer than 1,400 Blacks nationwide held elected office; by 1990, that number had increased to more than 7,300. At the same time, however, the practice of racial redistricting has become a source of bitter ideological and political feuds. Critics view the act as a hidden affirmative action program that encourages unhealthy race-conscious politics. Boston University political scientist Abigail Thernstrom argues that minority districts "promot[e] racial separation" and "inhibit

political integration" (see "Voting Rights' Trap, *The New Republic*, Sept. 2, 1985). The act's supporters respond that American politics already are race-conscious, but in ways that allow whites consistently to drown out minority voting interests.

But disagreements over the Voting Rights Act are more than arguments of principle. They are also intensely political. In some places, Republicans believe that the act enhances their prospects by safely concentrating minority voters in a few districts, thereby minimizing minority influence elsewhere. Meanwhile, Democrats are discovering that well-regarded white liberals are redistricted out of office to make way for minority politicians. There is, however, a new approach that could defuse much of this conflict. The Voting Rights Act might be amended to encourage cumulative voting, which would achieve the goals of the act just as effectively, while addressing the concerns of its detractors.

Cumulative voting is a simple concept: each voter is given as many votes to cast as there are seats to be filled. Voters are free to distribute their votes among candidates in any way they choose. This approach enables voters to express not just their raw preferences, but the intensity with which those preferences are held. In a five-way race, for example, a voter can cast one vote for each candidate, vote three times for one candidate and twice for a second, or cast all his votes for one candidate. In this way, minority groups with common interests and strong preferences for a particular candidate can ensure her election, even in the face of a hostile majority.

This represents a radically different alternative to the current Voting Rights Act. Rather than breaking up the at-large electoral system into five smaller territorial districts, cumulative voting has the advantage of leaving the original electoral system intact, yet it produces outcomes similar to those under the current laws. Under either approach, a 20 percent Black population that chooses to vote cohesively would be able to elect one of the five council members.

And cumulative voting offers striking advantages. Most obviously, it avoids drawing radically defined political districts that so trouble the act's critics. It might also diminish conflict between minority groups struggling over district boundary lines, such as between Blacks and Hispanics in many places. In fact, cumulative voting reduces gerrymandering opportunities in general. Because it relies on several candidates competing in at-large elections, it requires geographically broad electoral units. The fewer district lines there are to be drawn, the fewer invitations to gerrymander.

In many contexts, cumulative voting might offer an effective way of overcoming the conflict between geography and territory that is beginning to stymie voting rights policy.

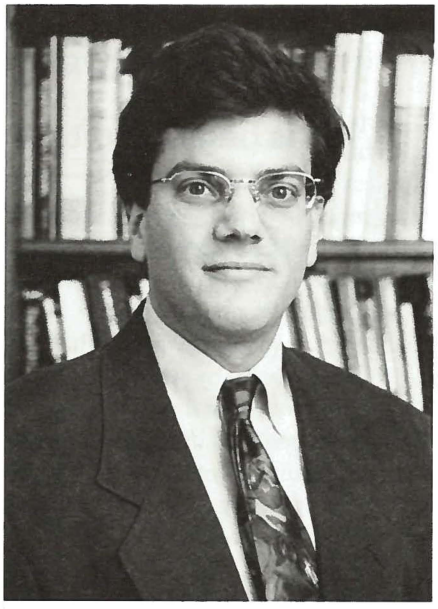
But the appeal of cumulative voting runs deeper. It is a way of pursuing the goals of the Voting Rights Act within the framework of political liberalism. Voters voluntarily define the voting affiliations that best promote their own interests. Adopting this approach thus avoids any assumption that Black or Hispanic voters are monolithic groups with unitary political values and interests. Under the current approach, Black voters of widely varying socioeconomic status are sometimes grouped together. Cumulative voting would enable these voters to decide for themselves whether their political values are better defined by what they have in common or by what they do not. The current law, moreover, singles out particular minority groups for distinct legal status. Cumulative voting reduces these moral and political conflicts by minimizing the need for judgments about which minority groups warrant distinct protection. Any group that feels the need to vote cohesively is able to do so. "Redistricting," in effect, is done by the voters themselves, not the politicians. Moreover, it takes place with each new election, instead of once a decade in the wake of a new census.

The most common concern about cumulative voting is that it is too confusing. But this reflects an instinctive fear of new voting procedures rather than informed experience. Cumulative voting already is used by some corporations in electing boards of directors. Illinois began using cumulative voting to elect its lower house in the aftermath of the Civil War. (Voters were given several chances to abolish the system, but it lasted until 1980, when the overall structure of the Illinois House was changed.)

In 1987, the city council for Alamogordo, N.M., was elected by cumulative voting, the first such local government election this century. Each voter had three votes to use in filling three city council seats; 70 percent of the voters seized this advantage and cast more than one vote for a particular candidate. Although the city's population was 24 percent Hispanic and 5 percent Black, it had been nearly 20 years since either a Hispanic or Black politician had been elected at large, but in the 1987 election, one Hispanic official was elected. She was only fourth in the number of voters who supporter her, but because her support was particularly intense, she finished third in total votes. Of Hispanics who voted for her, 80 percent gave her more than one vote. They thus relinquished some influence over two seats in order to ensure the election of the one candidate they strongly preferred. Similarly, in Sisseton, S.D., members of the Sisseton-Wahpeton Sioux tribe recently used cumulative voting to elect their candidate of choice to the local school board.

Cumulative voting is not a panacea. Under this system, voters must be knowledgeable about a larger number of candidates. Political campaigns might become more expensive as candidates pursue votes through a larger region. Representatives would have ties to a broader constituency, but perhaps not as strong as ones to a specific, local political base. Political parties might try to influence the results by taking control over the number of candidates they slate for office. Perhaps the greatest concern is that political bodies might become more fractured and less effective in governing as more officials come into office with the support of less than 50 percent of voters. These are genuine potential costs that warrant discussion.

But the status quo has its costs as well. We might therefore begin to test cumulative voting incrementally. The Voting Rights Act could be amended so that courts could consider cumulative voting as one option for redressing violations of the existing law. It may turn out that the system is not practical on a large scale. But the Voting Rights Act is here to stay, and we should consider new approaches that protect civil rights while easing political, ideological and racial tensions.



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